

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

ORIGINAL

In the Matter of)

 Implementation of Sections of the)
 Cable Television Consumer Protection)
 and Competition Act of 1992)

Rate Regulation)

MM Docket No. 92-266

RECEIVED

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS
 OF
FOX, INC.

To: The Commission

Fox, Inc. (Fox) files the following comments in response to the Notice of Proposed Rulemaking (Notice) in the above-referenced proceeding. These comments focus primarily on paragraphs 144 through 173, regarding leased commercial access of cable channels. We have one important point to make:

The Commission has the opportunity (and must) establish a meaningful leased access provision for the first time.

When the Cable Act of 1984 was passed, the program diversity through leased access was an important issue in the Congressional debate.¹

¹ See, Cable Telecommunications Act of 1983: Hearings on S.66 Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation, 98th Cong., 1st Sess. 123 (1983) (Senate Hearing); and Options for Cable Television: Hearings on H.R. 4103, H.R. 4229 and H.R. 4299 Before the House Subcommittee on Telecommunications, Consumer Protection and Finance of the Committee on Energy and Commerce 98th Cong., 1st Sess. 9 (1983) (House Hearings).

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On the one hand, the cable industry strove to limit the amount of capacity it would have to provide, arguing that cable operators themselves could provide diverse services on their own systems. On the other hand, the legislation itself was largely the product of a negotiated compromise between cable operators and local governments, in which some sort of leased access provisions were explicitly recognized as part of the trade off for deregulation of other aspects of cable operations, most particularly, rates. As then-chairman of the House Telecommunications and Finance Subcommittee Tim Wirth put it, at issue was "not should there be access, but how that access is done."² It is fair to say that Congress would not have so substantially deregulated the cable industry without the "safety value" of leased access as a safeguard against the specter of a cable bottleneck.³

Unfortunately, the leased access provision of the 1984 Cable Act was "done" in a manner that virtually guaranteed its total inefficacy.⁴ It simply was not used. The reason is simple. The economics are all wrong. Cable program services typically receive revenue from cable programmers. It is not possible to try to compete with existing (and, in many cases, vertically

² Senate Hearings, supra, at 286.

³ H.R. Rep. No. 934, 98th Cong., 2nd Sess. 31-32 (1984).

⁴ See Lampert, Donna N., "Cable Television: Does Leased Access Mean Least Access?", 44 Fed. Comm. L.J. 245 (1992).

integrated) cable program services (that receive revenue from operators) by leasing a channel and paying money to operators, particularly when cable operators are explicitly authorized to set discriminatory prices. In addition, under the statutory dispute resolution procedures, it is virtually impossible for an aggrieved party to prove that a cable operator has been unreasonable in complying with the statutory access provision.⁵

As the Commission recognizes at paragraph 145 of the Notice, the Cable Act of 1992 adds an additional purpose to the Communications Act--"To promote competition in the delivery of diverse sources of video programming"--specifically because of the importance of leased access provisions in "act[ing] as a safety valve for programmers who may be subject to a cable operator's market power and who may be denied access to [sic] be given access on unfavorable terms."⁶

To accomplish this new statutory goal, the Commission is granted new authority to establish maximum allowable rates for leased access, including the rate charged for billing and collection services. The Commission also has received new authority to establish reasonable terms and conditions "to govern billing and collection." These new provisions appear to

⁵ See Sen. Rep. No. 102-92, 102d Cong., 1st. Sess., at 30-32.

⁶ Id. at 30.

constitute a direct response to the Commission's recommendations to Congress in its 1990 Cable Report,⁷ and they create the first real prospect of competition through leased access.

The Notice, however, erroneously reaches the tentative conclusion that, contrary to the Commission's recommendation in its 1990 Cable Report,⁸ the new Cable Act does not require cable operators to provide billing and collection services. Instead, the Notice suggests that the Commission merely has the authority to regulate the rates for such services if an operator chooses to offer them.

To fulfill the intent of the Act the Commission must mandate that cable operators provide billing and collection and must set a maximum allowable percentage of its collections (e.g., 10%) that the operator is entitled to retain for its trouble. Without billing, collection and marketing services, the lessees must establish its own infrastructure for such functions in each market. This disincentivizes major programmers from seeking to lease channels and virtually forces them to negotiate affiliation agreements with cable operators on any terms, however unfavorable. A leased access regime of any efficacy must include a mandate that billing and collection services be provided by the


⁷ Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, Report, 5 FCC 4962, 67 RR 2d 1771 (1990).

⁸ Id. at 5050; 67 R.R. 2d at 1812.

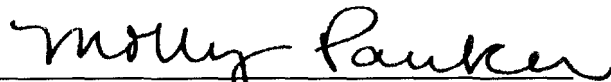
cable operator. Moreover, the rates charged to the programmer to lease the channel should not exceed the "cost-of-service" rates outlined at paragraphs 149 through 151 of the Notice. This time, the Congress clearly meant leased access to work, and the only way it will work is to establish economics that will permit lessees to compete with existing cable services.

The Commission now has the opportunity to create a truly competitive cable environment by adopting meaningful leased access provisions. This is not only best for consumers--in the long run, it will best serve the industry itself, positioning it realistically for the future. We urge the Commission to exercise the courage to take this course.

Respectfully submitted,

A handwritten signature in dark ink, reading "Preston Padden /imp". The signature is written in a cursive style with a horizontal line underneath.

Preston Padden, Esq.
Senior Vice President, Affiliates
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A handwritten signature in dark ink, reading "Molly Pauker". The signature is written in a cursive style with a horizontal line underneath.

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